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No. 77-770

In the Supreme Court of the United States

OCTOBER TERM, 1977

ENNIS MONROE AKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

WILLIAM G. OTIS,
SARA CRISCITELLI,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 562 F. 2d 459.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1977. A petition for rehearing was denied on October 28, 1977. The petition for a writ of certiorari was filed on November 28, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court erred in refusing to ask jurors individually whether they had read a newspaper article about the trial.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Indiana, petitioner was convicted of selling and disposing of stolen securities, in violation of 18 U.S.C. 2315, and sentenced to 30 months' imprisonment. The court of appeals affirmed (Pet. App. A).

On January 27, 1976, municipal bonds with a market value of approximately $1,330,000 (Tr. 390-391) were stolen from MuniciCorp, a California corporation (Tr. 388). The evidence at trial, much of which was provided by Lynn Kucala, a co-defendant who pleaded guilty, established that petitioner, Kucala, and co-defendants Beverly Hart and Jerome Fusco arranged to sell these securities to an undercover FBI agent for $200,000 (Pet. App. 25 n. 1, 26-28).[1]

While the trial was in progress, an item appeared on page seven of the morning newspaper, the *Indianapolis Star*, that described the court's denial of defendants' motion for a directed verdict as follows: "However, Judge Dillin ruled he felt the Government had very little difficulty in proving each and all defendants guilty beyond a reasonable doubt" (Tr. 454). Defense counsel brought this article to the court's attention and requested an individual *voir dire* of the jurors to determine if any of them had seen the article and to assess its impact (*ibid.*).

The court agreed that individual questioning was appropriate if any of the jurors had read the article, but declined to question them individually as to whether they

[1]Hart and Fusco were also convicted. Hart was sentenced to seven years' imprisonment and Fusco and Kucala each received sentences of 30 months' imprisonment, of which six months was to be served and the remainder suspended, with two years' probation.

had seen the article (Tr. 454-459). The judge stated that individual questioning on this point would tend to excite the jurors and create an inappropriate "aura of mystery," and that it was not likely that many would even have read the paper, which had limited circulation (*ibid.*). He also rejected petitioner's suggestion that the interrogation take place in the absence of counsel and court reporter (Tr. 456). As the government counsel noted, this would be a "highly offensive" procedure in the middle of a trial (Tr. 457). The court then proceeded to inquire how many jurors had read the newspaper that morning. Two jurors stated that they had glanced at the paper, and one of these said that she had brought a copy of the newspaper into the jury room. Further questioning showed that neither juror had seen the article in question (Tr. 459-460; see also Pet. App. 40 n. 6). The court informed the jury that the newspaper contained an inaccurate statement concerning the trial and ordered that the relevant page be removed from the paper that had come into the jury room (Tr. 460).

ARGUMENT

Petitioner contends (Pet. 8-22) that the trial court committed reversible error in refusing to question the jurors individually as to whether they had read the article published in the *Indianapolis Star*. He also urges this Court to resolve a conflict among the court of appeals concerning proper procedures for questioning jurors where prejudicial publicity has occurred during the course of the trial.

1. Petitioner exaggerates the extent of disagreement among the circuits. As he notes (Pet. 9), the First, Fourth and Seventh Circuits do not routinely require jurors to be questioned individually, out of the presence of the other jurors, as to whether they have seen or heard the particular prejudicial news item. Only if jurors indicate

that they have seen the particular article must those jurors be questioned individually. See, *e.g.*, *United States* v. *Perrotta*, 553 F. 2d 247 (C.A. 1); *United States* v. *Hankish*, 502 F. 2d 71 (C.A. 4); *Margoles* v. *United States*, 407 F. 2d 727 (C.A. 7), certiorari denied, 396 U.S. 833. But the Seventh and First Circuits have been careful to note that there may be circumstances when even the initial inquiry should be conducted individually, and to caution that the trial court should be sensitive to this possibility. See Pet. App. 42-43; *United States* v. *Perrotta*, *supra*, 553 F. 2d at 250 n. 6.

The Fifth and Ninth Circuits differ from the Seventh, First and Fourth Circuits. They have stated that conducting the initial inquiry individually is the "better practice" or the "safer practice," but these circuits also do not set a rigid rule. See *United States* v. *Polizzi*, 500 F. 2d 856, 880 (C.A. 9), certiorari denied, 419 U.S. 1120, *United States* v. *Schrimsher*, 493 F. 2d 848, 854 (C.A. 5).[2]

Only the Tenth Circuit cases upon which petitioner relies (Pet. 19) (*Hall* v. *United States*, 396 F. 2d 428, certiorari denied, 393 U.S. 986; *Mares* v. *United States*, 383 F. 2d 805, certiorari denied, 394 U.S. 963) enunciate a general rule that the initial inquiry, to identify whether any of the jurors has seen or heard the prejudicial publicity, must be made individually and out of the presence of the other jurors. But even in those cases, the court had no occasion to determine if it would find

[2]The District of Columbia Circuit, in *Coppedge* v. *United States*, 272 F. 2d 504, certiorari denied, 368 U.S. 855, upon which petitioner relies to show a conflict among the circuits (Pet. 19), did not address the preliminary inquiry at all, but was concerned with the failure of the trial court to "address" the jurors who admitted to having seen certain news articles "as to the possible influence of articles upon each of them." 272 F. 2d at 508.

reversible error where, as here, a general inquiry disclosed that no juror had seen the article in question and there was no evidence that the jurors were being untruthful in their responses.[3]

We submit that such variations in approved practice as do exist among the circuits need not be resolved into a uniform rule by this Court. While interrogating jurors individually may cause them to be somewhat more forthcoming as to whether they have seen or heard a news item, the effect of individual questioning at this point is probably marginal. A juror should not be particularly reluctant to admit in open court that he saw a headline but did not read the article, particularly where the court's admonition is only against reading articles dealing with the trial.[4] Individual inquiry becomes appropriate later, in determining how much the juror saw and what effect this has on his ability to decide the case fairly. And while initial individual questioning may be of marginal usefulness in obtaining truthful answers, it has the disadvantage of emphasizing the matter and arousing jurors' suspicions.

The two lines of opinion on this issue are, we submit, so closely matched as to their advantages and disadvantages that variations in practice make little difference in the

[3]In *Mares*, *supra*, the jurors were not polled at all concerning prejudicial publicity, and this aggravated circumstance was held to constitute reversible error. In *Hall*, *supra*, failure to follow the rule set out in *Mares* did not result in reversal; the court affirmed because plaintiff did not object to the procedure followed, the publicity was relatively innocuous, and the trial court did conduct a general inquiry to determine which jurors had read the article and their ability to decide the case fairly (396 F. 2d at 429-430).

[4]In this case the jury was not forbidden from reading newspapers, but only told not to read accounts of the case (see, *e.g.*, Tr. 268, 434).

fairness accorded individual defendants. Either method accords an adequate measure of protection from prejudicial influences on the jury. There is therefore no need for this Court to prescribe a uniform rule.

2. In any event, the present case is not an appropriate one for resolving this issue, since the trial court's conduct would probably have been upheld by any of the courts upon whose opinions petitioner relies (Pet. 19). The article was not located in a prominent position in the paper. No juror indicated that he gave any more than a cursory glance at the paper, and the two jurors who had looked at the paper said they had not seen the particular article. The item was brought to the court's attention on the morning of its publication, and the jury was questioned and cautioned immediately thereafter. Moreover, throughout the trial the court repeatedly admonished the jury to avoid newspaper and media accounts of the trial (see, *e.g.*, Tr. 268, 434). There is no reason to believe that the jurors disobeyed these express instructions—a conclusion that cannot be lightly drawn (*Opper* v. *United States*, 348 U.S. 84, 95)—or that they then lied about their actions when questioned by the trial court. In short, there is no indication whatsoever that individual questioning would have produced different responses from the jurors.[5]

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[5]Petitioner also argues (Pet. 21-22) that reversal is required in this case because the prejudice to him equalled that in *Marshall* v. *United States*, 360 U.S. 310. This claim is without merit. In *Marshall* seven jurors stated they had read one or more highly prejudicial articles that contained information excluded at trial. In the present case, by contrast, there is no evidence that any juror saw the article.

In these circumstances, it is not clear that even the Tenth Circuit would have ordered a new trial, and the Ninth and Fifth Circuits would probably have regarded the judge's actions as a harmless divergence from what those circuits regard as the better practice.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

WILLIAM G. OTIS,
SARA CRISCITELLI,
Attorneys.

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